In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 70

In the Matter of the Application of
MITSUYE ENDO
for a Writ of Habeas Corpus.

MITSUYE ENDO,

Appellant,

vs.

MILTON EISENHOWER, Director of War Relocation Authority, etc., et al.,

Appellees.

BRIEF OF THE NORTHERN CALIFORNIA BRANCH OF THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF APPELLANT.

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Subject Index

Table of Authorities Cited

Cases

Codes and Statutes

Miscellaneous

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JURISDICTION

This is an appeal from a judgment of the District Court of the United States for the Northern District of California made and entered on July 2, 1943 (R.

15-16), denying the appellant's petition (R. 2-10) for a writ of habeas corpus. The District Court had jurisdiction of the cause under 28 USCA, Sec. 451. The Circuit Court of Appeals for the Ninth Circuit had jurisdiction of the appeal under 28 USCA, Secs. 225 and 463. The memorandum opinion (R. 15-16) of the District Court is not reported. The case comes before the Supreme Court of the United States upon a Certificate of Questions of Law upon which the Ninth Circuit Court of Appeals desires instructions for a proper disposition of the cause.

BASIC QUESTION INVOLVED

Without first applying to receive the meager and doubtful benefits of a restricted and conditional leave which amounts to nothing more than increasing the dimensions of her prison does habeas corpus lie to release a loyal American citizen from 2½ years of illegal detention by the W.R.A. without trial, where her detention is not based upon an offense but solely upon the fact that her genealogy reveals ancestors who once were of Japanese nationality? This basic question encompasses the four questions certified to this Court for determination.

STATEMENT OF THE CASE

The appellant is a twenty-four-year-old citizen of the United States and of the State of California by birth. She is loyal and devoted to this country and

nation. Her brother also is a citizen and serving in the U. S. Army. Until recently she was detained in the Tule Lake War Relocation Center, a concentration camp, situated at Newell, Modoc County, California. Prior to her incarceration she was a resident of Sacramento, California, and was gainfully employed, occupying the status of a permanent civil service employee of California at Sacramento. In the latter part of 1942 she was removed from said relocation center to another like prison situated at Topaz, Utah, where she is presently confined in custody by the appellees. On February 9, 1943, she applied to the Director of the W.R.A. for a leave clearance. On August 23, 1943, her application was granted. The grant is equivalent to a finding that she is loyal and in nowise a menace to national security, but does not operate as an unconditional release from her detention. While illegally detained by the W.R.A. at the Tule Lake War Relocation Center she applied to the District Court below for a writ of habeas corpus. No return was required or made to her petition, and no hearing was had thereon. The petition was denied and this appeal was initiated from the order denying the petition.

ARGUMENT

A. HISTORY OF OPPRESSION.

Immediately following the attack upon our Hawaiian outposts by fragments of the Japanese naval air-arm on December 7, 1941, the President issued

Proclamation No. 2525 enjoining Japanese nationals within our jurisdiction to preserve the peace and to comply with regulations to be promulgated. On December 8, 1941, he issued Proclamations Nos. 2526 and 2527 placing like injunctions upon German and Italian nationals within our jurisdiction. These proclamations were issued under authority of the *Alien Enemy Act*, 50 USCA 21. (H.R. 2124, 77th Cong., 2nd Sess., May, 1942,[1] pp. 294-300.) Thereafter, between January 20, 1942, and February 7, 1942, the Attorney General, pursuant to power vested in the Executive under the Alien Enemy Act, set up zones upon the Western littoral and restricted the activities of alien enemies therein. (H.R. 2124, pp. 302-314.)

Thereafter, on February 19, 1942, in order to provide for the transportation, food, shelter and other accommodations of persons who might be prohibited from leaving or entering military areas which might thereafter be prescribed by the Secretary of War or military commanders designated by him, the President issued Executive Order No. 9066. (See 7 F.R. 1407.) This order appears to have been intended to ratify and approve the previous restrictive action taken against alien enemies by the Attorney General pursuant to presidential Proclamations 2525, 2526, and 2527. Its preamble declares its purpose was the taking of every possible protection against espionage and sabotage to national defense material, premises

[1] Report of "Select Committee Investigating National Defense Migration", commonly called the Tolan Committee Report.

and utilities defined in 50 USCA, Secs. 101 and 104. It is from this order that General DeWitt's proclamations and exclusion orders hereinafter mentioned assert they derive validity. It does not appear that it was intended by the President to permit a wanton discrimination against citizens of Japanese origin. However, it is adroitly worded. If issued under authority of the Alien Enemy Act it had no reference to citizens and the military orders issued under a claim of authority therefrom lack validity. If intended to authorize a discrimination against citizens on the basis of the nationality of their ancestors it is extra-constitutional and the military orders issued under its authority are unconstitutional and void. Military action taken thereunder, whether directed by the President and approved by Congress or not, which abridges practically all the constitutional rights of the appellant and approximately 73,000 citizens is not sanctioned by the Constitution. It is an expression of an arbitrary and autocratic rule undignified by the name of government. Autocracy admits the people are under the heel of tyrants whereas representative government implies that the governing bodies represent the people within constitutional boundaries.

On March 2, 1942 John L. DeWitt, Lt. Gen., U.S.A., promulgated Public Proclamation No. 1 (7 F.R. 2320) which set up Military Areas Nos. 1 and 2 and required *alien enemies* and *citizens of Japanese ancestry* in Military Area No. 1 to give notice of change of residence. Thereafter, on March 16, 1942, he promulgated Public Proclamation No. 2 (7 F.R. 2405)

which set up four additional military areas, Nos. 3 to 6, inclusive, and required a like giving of notice of change in residence. The military department of General DeWitt's command thusly set up embraces eight Western States and comprises in excess of one-fourth of the total geographical area of the Continental United States.

On March 18, 1942 the President issued Executive Order No. 9102 (7 F.R. 2165), setting up the War Relocation Authority, an executive office, for the purpose of formulating and effectuating a program for the removal, from military areas designated by military commanders, of persons or classes of persons designated but not evacuated therefrom under authority of Executive Order No. 9066.

On March 21, 1942, Public Law No. 503 (18 USCA 97a) became effective.[2] It makes it a disdemeanor for anyone to enter or leave a military area against a military commander's orders in military areas prescribed by him. As applied the statute appears to be a bill of attainder repugnant to Art. I, Sec. 9, cl. 3

[2]There is nothing in the legislative history of this statute suggesting that departures of excluded persons from forbidden areas were expected to be other than voluntary. (H.R. 2124, pp. 167-169.) There is nothing therein suggesting that Congress and the Executive were informed or understood that compulsory evacuation and detention on a mass scale were contemplated. There appears to be no evidence that Congress and the Executive, or either, authorized or approved the banishment and imprisonment program later put into practice. Their silence on the matter is not to be construed as acquiescence in the program or approval of it. Their nonintervention does not signify approval and does not constitute a ratification. It means merely that these divisions of government leave it to the judiciary to determine whether a military commander has exceeded the allowable limits of military discretion.

of the Constitution. (See *In re Yung Sing Hee*, 36 Fed. 437.)

Thereafter, on March 24, 1942, he promulgated Public Proclamation No. 3 (7 F.R. 2453) which subjected the appellant, all alien enemies and persons of Japanese ancestry within Military Area No. 1 and zones in Military Areas Nos. 2 to 6, inclusive, to *curfew regulations* and *travel restrictions*. If threatened the citizens affected thereby with criminal prosecution under Public Law No. 503 for a violation of its provisions and alien enemies with internment for a violation thereof. It also prohibited citizens of Japanese ancestry from possessing certain personal property and compelled the confiscation thereof. On the same day he issued Civilian Exclusion Order No. 1 (7 F.R. 2581) excluding Japanese aliens and citizens of Japanese ancestry from Bainbridge Island, Wash., allowing those who received permission to leave by March 29, 1942, for destinations outside the boundaries of Military Area No. 1 and enjoining those remaining there on March 30, 1942, to report to a Civil Control Station for evacuation.

On March 27, 1942, he promulgated Public Proclamation No. 4 (7 F.R. 2601) which prohibited the citizen appellant and all other persons of like ancestry from leaving the limits of Military Area No. 1 where she resided and was employed. This put an end to voluntary departure for destinations outside his jurisdiction. (See also, Public Proclamation No. 6; 7 F.R. 4436.) It also threatened citizens with criminal prosecution and alien enemies with internment for

a violation of its provisions. On March 30, 1942, he issued Public Proclamation, No. 5 (7 F.R. 3725) allowing certain German and Italian aliens exemption from exclusion from military areas. Like exemptions were not allowed to alien Japanese and citizens of Japanese stock.

Thereafter, he issued a series of civilian exclusion orders which resulted in the imprisonment of some 73,000 citizens and 43,000 aliens of Japanese descent. A total of 108 of these orders was issued by the proud General, No. 1 having issued on March 24, 1942 (7 F.R. 2581), and the last, No. 108, having issued on July 22, 1942 (7 F.R. 5916), each being published in Volume 7 of the Federal Register. These orders ought to be termed "*Dispersion Orders*" because, by reason of them, thousands of men, women and children were driven from homes into government controlled ghettos or prisons. In this shameful fashion these unfortunate citizens, old and young, were discriminated against because of the old cast-off nationality of their ancestors, were branded disloyal and were robbed of their properties, rights and liberties.[3] They have been classed and treated as though they were criminals of the lowest type for whom the treatment reserved for hostile alien enemies and prisoners of war was deemed too good.

Under these various civilian exclusion orders the imprisonment of these people was accomplished as

[3] It is probable that on December 7, 1941, each family of Japanese stock within our jurisdiction had at least one representative serving in our armed forces. In addition to those then serving in the Territorial Guard and the National Guard of Hawaii, in excess of 5000 youths of Japanese ancestry were serving in the Army.

follows: They were ordered from the whole of California (See Public Proclamations Nos. 4 and 11; 7 F.R. 2601 and 6703) and portions of Washington, Oregon and Arizona unless they were within the bounds of Assembly Centers which were under the control of the W.C.C.A.,[4] a military agency set up by General DeWitt and termed the Wartime Civil Control Administration. (See also, Public Proclamation No. 7 of June 8, 1942; 7 F.R. 4498.) These orders drove them into these Assembly Centers, from which they were removed under military guard to Relocation Centers managed by the W.R.A. On May 19, 1942, the General issued Civilian Restrictive Order No. 1 (8 F.R. 982), a general detention order prohibiting these people from leaving these Assembly and Relocation Centers without authority.[5] On June 27, 1942, he promulgated Public Proclamation No. 8 (7 F.R. 8346) which designated existing and future relocation centers within his department as War Relocation Project Areas. It required the inmates to

[4]This is one of the few alphabetical agencies that does not appear to have been created by executive order but, like Athena, seems to have sprung full-grown and full-armed from the brain of General DeWitt who would play the rule of Zeus over these people.

[5]Neither Civilian Restrictive Order No. 1 (8 F.R. 982) nor Public Proclamation No. 8 (7 F.R. 8346), was directly or indirectly authorized or approved by Congress and the executive or by either. The power to issue these detention orders never was delegated to General DeWitt and could not be delegated to him under the Constitution. They were products of usurped power of an extra-constitutional nature. When Public Law No. 503 became effective it was not understood by Congress or the President that it was intended to be used as an instrument to cause the mass banishment and imprisonment of a people. Consequently, it cannot be argued that Congress and the President or either of them authorized or approved the program inaugurated by General DeWitt.

remain within the bounds thereof and visitors to obtain written permission from his headquarters to visit them. With all these requirements and the trappings and atmosphere of these camps the appellees and the General would lead us to believe these camps are sanctuaries or asylums maintained by the government instead of prisons or concentration camps. By letter dated August 11, 1942, the General delegated authority to the W.R.A. to issue permits for conditional leave from these prisons to persons who could qualify therefor. The source of his right to delegate this authority is not apparent. On August 13, 1942, the Secretary of War issued Public Proclamation WD-1 (7 F.R. 6593) under which the relocation centers *outside* General DeWitt's departmental command were designated military areas and the departure of persons of Japanese origin there confined was forbidden without permission of the Secretary of War or the Director of the W.R.A. The triumvirate, the General, the War Department and the W.R.A., were responsible for the wrongs of which we complain.

Civilian Exclusion Order No. 52 (7 F.R. 3559) with which we here are concerned issued on May 7, 1942. Under this extraordinary order the appellant was required, under pain of criminal prosecution under Public Law No. 503, to abandon her home and was compelled to report to a Civil Control Station.[6] There

[6] In practice the citizen who violated an exclusion order was made subject to greater punishment than the alien enemy violator. The alien ran the risk of internment. The citizen ran the risk of prosecution under Public Law No. 503, fine and imprisonment in a federal penitentiary upon conviction and, thereafter, confinement in one of these concentration camps.

she received military commands compelling her to aid her oppressors in accomplishing her temporary imprisonment in a "stockade" termed an Assembly Center, her banishment from these States embracing military areas, and her ultimate confinement and detention in a military prison for an indefinite period of time. In official documents this prison bears the deceptive cognomen of a War Relocation Center. The misleading names applied to these centers were designed to conceal from the public-at-large, but not from the prisoners, the patent fact of the existence of concentration camps for citizens in civilized America. By reason of this mistreatment she was deprived of her liberty, her home, her property, her employment as a permanent civil service employee of California and the emoluments of said office. Under said order she was coerced into an Assembly Center situated in Sacramento, from whence she was removed under armed military guard to the aforesaid prison at Tule Lake. (See Civilian Exclusion Order No. 100 issued by said General on June 30, 1942, 7 F.R. 5369; and Public Proclamation No. 11 of August 18, 1942, 7 F.R. 6703.) Thereafter, under reshuffling orders of the W.R.A., she was removed to the Relocation Center situated at Topaz, Utah, where she is now detained by the appellees.* This is another of the ten relocation centers, six of which are within the military department of the Western Defense Command

*This removal does not deprive the Court of jurisdiction in habeas corpus proceedings. See *Ex parte Catanzaro*, 138 Fed. (2d) 100; 28 USCA, Sec. 463; Rule 29 (1) of the Rules of the Ninth Circuit Court of Appeals; Rule 45, par. 1, of Rules of the Supreme Court.

and four of which are situated outside said department. (See Public Proclamation WD-1, dated August 13, 1942, 7 F.R. 6593, establishing these prisons.)

We charge, therefore, that General DeWitt, the military commander who once commanded the Western Defense Command and Fourth Army, arrested, banished and imprisoned the appellant without color of right and in utter defiance of the very Constitution he was by oath bound to defend and preserve. We charge that this affront was accomplished under an assumption that the writ of habeas corpus was suspendable and impliedly suspended by him in an area free from martial rule. We charge this outrage was accomplished under an assumption that the caprice of a military commander in time of war overrides civil right in an area remote from a theater of war. We charge that her continued detention by the W.R.A. under the pretext that it is authorized by Executive Order 9066 is in disregard of the Constitution and that it intensifies the odious injustice perpetrated upon her by a branch of her own government. We charge that her arrest, banishment and detention were inflicted upon her simply because her genealogy reveals she was unfortunate in having had ancestors over whom a past and almost forgotten Shogun or Mikado asserted a temporal jurisdiction. We charge that the District Court below erred in denying appellant's application for a writ and that therein it upheld this sorry action of the military commander and the illegal detention of the appellant by the appellees.

NATURE OF HABEAS CORPUS

The writ of *habeas corpus ad subjiciendum* issues for a violation of personal liberty. Although its actual origin is still somewhat clouded in obscurity, it is known to have been in use in England along with the similar writs *de odio et atia* and *de manucaptione* (mainprise) in the 12th century and probably earlier. Being an element of *folk-right* as distinguished from mere privilege it represented a phase of the juridical consciousness of the people. Being tribal in origin it was a right doubtlessly safeguarded in the 10th and 11th centuries by the shiremoots which were heirs to tribal jural functions and were primarily judicial bodies. The writ could not have originated with the witan of the realm who as administrative officials formulated and applied rules on the grounds of State expediency, that is, State expediency as conceived by them. The people long suffered at the hands of the witan. The political successors of the witan today view themselves as the repository of all political wisdom. They suffer from the delusion their place is at the head and that of men of intellect in the train of great events. They either belittle or ignore the Constitution and appear to regard democracy as a term to beguile the masses while they fashion the harness of dictatorship about them. Viewing themselves as men of importance, of action, of destiny, these so-called history-makers look upon the people as clods of clay they may mold into what forms they will. In Germany after their seizure of political power each of the Nazis who regarded himself as one of the

Witan suddenly became possessed of the notion he was a Wotan. It is a pathological disease to which administrative officials are peculiarly susceptible. It would be a sad commentary on American democracy were our own witan to succumb to a similar contagion.

As a remedial mandatory writ of right *habeas corpus* was a fundamental part of the common law and was implemented by Magna Carta and subsequent enactments. It is based upon the ancient tribal concept that long had been a part of the "law of the land" that a freeman could not be detained in custody except on a criminal charge or conviction or for civil debt. This concept later was crystallized and expressed at Runnymede by the Norman baronage and higher clergy in 1215 in Magna Carta in the following words:

> "Nullus liber homo capiatur vel imprisonetur aut dissaiseturaut ultagetur, aut exuletur aut aliquo modo destruatur nec super eum ibimus nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae."

It was recognized as the proper process against illegal imprisonment by inferior courts and public officials during the early 17th century. In 1627, however, it was held that bodily detention pursuant to the command of the king was a sufficient answer to a writ of habeas corpus. Parliament thereupon passed the Petition of Rights (3 Carl. I.c.i.) which provided that a freeman could not be imprisoned upon a special command of the king issued without cause. The application of this statute was ignored in Selden's

case (1629). Consequently, Parliament, in 1640, abolished the Star Chamber and expressly designated habeas corpus as the appropriate legal measure to test the legality of detention by order of the king or privy council. Thereafter, the Habeas Corpus Act of 1679 (31 Car. II, c. 2) was enacted. It provided for the enforcement of the common law right to the writ. Its effect was to compel the courts to protect the personal liberties of citizens. It accomplished this purpose by enabling the judiciary to restrain the executive branch of government from usurping legislative and judicial power. Through the instrumentality of the writ inquiries into the cause of detention were made and *lettres de cachet* grew rare. A number of the American colonies adopted this Act prior to the Declaration of Independence and thereafter Congress and the several States founded their procedure thereon. These enactments implement the common law we have inherited from England on the subject. The Act of 1679 was suspended temporarily in times of public danger by special Parliamentary legislation, notably in 1794 and 1817, the exercise of the power of suspension being deemed vested in the legislative and not in the executive division of government.[8]

The writ is so thoroughly entrenched in Anglo-American jurisprudence that it long has been con-

[8] The history of this struggle in essence is a recapitulation of the fight waged by many peoples in many ages to prevent the executive from exercising legislative powers as the origin of the Declaration of Independence, 1776, the States-General, 1302, Magna Carta in 1215, the Archons in Athens and the Ephori in Sparta confirm.

sidered a right absolute of the citizens of a free nation. It was designed to be an effective judicial remedy for the evils of *letters de cachet* and other types of illegal detention. For centuries it has been esteemed "the best and only sufficient defense of personal freedom." *Ex parte Yeager*, 8 Wall. 85. The right to the writ is derived from the common law but the power of our federal Courts to issue it exists by virtue of the Habeas Corpus Act, 28 USCA, Sec. 451 *et seq.* See *Ex parte Bollman*, 4 Cranch 75. This statute does not define the term habeas corpus, consequently the history, purpose and scope of the writ is determined by an examination of the common law. *McNally v. Hill*, 293 U. S. 131.

Being a traditional incident of judicial power it is doubtful if the writ, in the absence of constitutional authority, could be suspended by Congress any more than the judicial department of government itself could be suspended. There is evidence, however, of a movement and a trend in this country the objectives of which are the relegation of the Constitution to the limbo of antique and curious documents and the withering of the powers of the Courts and Congress. Many politicians and executive officials of the day look with avaricious eyes to the inheritance or capture of absolute political power. They hope the great prize will fall into their laps in this period of public apathy and political bankruptcy when government itself daily grows more amorphous in character and, when, in lieu of congressional statutes, we are confronted with, hemmed in by and ordered about by countless admin-

istrative directives issued in utter disregard of constitutional right. This age in America might well be called the Constitution-Tampering-Age inasmuch as we are treated to the continuing spectacle of experimentation with powers that cannot signify anything but a prelude to dictatorship.

It is noteworthy that the framers of the Constitution assumed the right to the writ to be inherent in judicial power for we find in that document no vesting of the right to issue the writ but we do find expressed therein a wise prohibition against its suspension by Congress, for Art. 1, Sec. 9, cl. 2 provides:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it."

It is this clear and unmistakable safeguard that has been violated herein as though it were an ambiguous provision to be suspended at the whim of a military commander or in aid of his whim and the suspension to be explained away by judicial sophistry on the spurious ground that it means whatever might serve his interest or prejudice. Although we are in trying times we have not reached the stage where we are willing to concede that the voice of a military commander must be listened to as the voice of God. We recognize that by a multiplication of executive orders the administrative branch of government seems to have encircled Congress and by-passed our Courts but we are not yet so weak and so debased that we are willing to yield all legislative and judicial power to

executive officials. Despite the attacks upon constitutional and human rights by the political epigoni of the day we are not willing to regard constitutional government as a forgotten episode in American history. We the People do not intend that this, our cherished writ, any more than our Holy Writ, shall be regarded as a trifle and be taken from us by our appointed servants without a struggle. What we have gained and preserved over centuries against government we will not surrender simply to satisfy the whims and vagaries of administrative officials and obscure military commanders.

ISSUES FRAMED BY RECORD.

On its face the application for the writ of habeas corpus filed on July 13, 1942 (R. 19), presented facts setting forth an illegal detention of the petitioner. Consequently, the Court below ought to have issued either the writ or an order to show cause for service upon the respondents.* Neither such a writ nor order issued thereon, however. On July 15th and 20th, 1942, oral arguments were heard on the petition and the cause submitted for decision as to whether such a writ or order should issue. The matter was briefed by the parties and by amici curiae.

Thereafter, on January 7, 1943, Elmer Shirrell voluntarily filed an affidavit in the Clerk's Office in the

*The *order* to show cause or, as it has been termed, *rule* to show cause, is a procedural innovation which seems to have gained judicial recognition and approval. See *Walker v. Johnston*, 312 U.S. 275 at 284, 287.

proceeding below (R. 12) stating that under an undesignated Proclamation of General DeWitt the petitioner had been removed to the Tule Lake War Relocation Center where she "resides", by which deceitful word is meant she is imprisoned.[10] It recites that she had not applied for a conditional and restricted leave from her prison (R. 13) under the regulations (7 F.R. 7656-7658) promulgated by the Director of the W.R.A. It does not appear from the record whether this anomalous document was served upon the petitioner or her counsel. On February 19, 1943, James C. Purcell, counsel for petitioner, filed in said proceeding a counter-affidavit (R. 14) which would have been entitled to consideration as a traverse thereto under 28 USCA 460 if the affidavit of Mr. Shirrell in fact had been a return under 28 USCA 457. However, neither of the two affidavits satisfies the requirements of a pleading and neither was entitled to consideration as evidentiary matter without a stipulation first being made between the parties to the proceeding or without a hearing on their admissibility.

Thereafter, on July 2, 1943, almost one year later, an order of the Court below denying the petition was entered (R. 15-16) reciting as grounds therefor that it appeared from the face of the petition that the petitioner was not entitled to a writ of habeas corpus and that she had not exhausted her administrative

[10] The affidavit was not entitled to consideration and ought to have been disregarded or stricken by the Court on its own motion inasmuch as Mr. Shirrell was not a respondent or counsel for a party but a mere volunteer or interloper in the proceeding below.

remedies under Executive Order 9102 as a condition precedent. By referring to an asserted failure of the petitioner to exhaust her administrative remedies the order indicates the Court below considered the affidavit of Mr. Shirrell and the counter-affidavit of Mr. Purcell either as pleadings or as evidence inasmuch as the matters therein related cannot be deemed to be within the province of judicial notice or knowledge. Therein that Court erred because the petitioner was entitled to a hearing on the admissibility of these affidavits and upon the question whether factual issues were presented requiring a hearing. However, whether the affidavits were entitled to weight or not is immaterial for, as hereinafter argued, the verified petition considered with or without the affidavits ought to have been granted. Considered alone the petition called for the issuance either of the writ or an order to show cause. Had a return been filed thereto it could not have traversed the petition or raised a conflict upon any material issue tendered thereby, consequently, it would have been the duty of the Court to have discharged the petitioner from custody either with or without a hearing thereon.

When an application for the writ states the required jurisdictional facts, it is the duty of a Court forthwith to "award the writ unless it appears from the petition itself that the party is not entitled thereto." 28 USCA 455. Upon a return being made admitting the facts therein the writ should issue. If the return denies the allegations of the application or raises a substantial conflict on the truth of the recitals contained therein it becomes the duty of the

Court to hold a hearing thereon to determine the truth of the recitals and thereupon decide whether the applicant is entitled to a discharge from detention. 28 USCA 461. This was expressly decided in *Ex parte Milligan*, 4 Wall. (U. S.) 2, in the following language:

> "The suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the Court decides whether the party applying is denied the right of proceeding any further with it."

The application for the writ herein did not reveal on its face any reasons why the writ should not issue. Consequently, it was incumbent upon the Court below to have issued either an order to show cause why the writ should not be granted or a writ as a matter of course for service upon the respondents. *Walker v. Johnston*, 312 U.S. 275,282. Thereafter the respondents would be entitled to file a return whereupon a hearing on the validity of the detention would follow as a matter of right, 28 USCA 457.

The affidavit of Mr. Shirrell (R. 11) filed informally in the proceeding below long after the cause had been submitted for decision neither traverses the allegations of the petition nor contains a statement of facts justifying the detention of the petitioner. It was, therefore, the duty of the Court below to have ignored it entirely or to have dismissed it as an evasive substitute for a return and thereupon have issued the writ. In wartime a return stating that the detention of an alien enemy is pursuant to a presi-

dential warrant issued under authority of the Alien Enemy Act is sufficient answer to a writ but a similar return cannot be accepted as an adequate answer to the detention of an American citizen. *Ex parte Fronklin*, 253 Fed 984; *Ex parte Risse and Staliforth*, 257 Fed. 102; and *Ex parte Gilroy*, 257 Fed. 110. A person in custody is entitled to have "a judicial inquiry into the very truth and substance of the causes of his detention" through the medium of the writ. This judicial inquiry "involves the reception of testimony, as the language of the statute shows." *Johnson v. Zerbst*, 304 U.S. 458, 466; *Walker v Johnston*, supra, at 283. The failure of the Court below to issue an order to show cause or the writ and to hold a hearing thereon was erroneous.

There seems to be no logical historical precedent upon which Courts, by resort to judicial knowledge of doubtful data, might invoke a defense to an application for a writ, or supply defenses or fill deficiencies in a public official's response to an application for the writ. Such a practice would substitute excuses for reasons. There is neither logical nor legal justification for a Court to adopt the view that the General's constitution-destroying orders are presumptively justified and that a citizen who is abused thereby and whose rights are curtailed are matters of such trifling signifficance as to merit only casual or perfunctory notice. The failure of the District Court to grant the writ as a matter of course when the petition alleged an illegal detention on its face was a denial of due process of law under the 5th Amendment. Its failure to grant a hearing thereon was a denial of the right

to a speedy and public trial in violation of the 6th Amendment. In addition it violated the provisions of the habeas corpus acts. Title 28 USCA, Sec. 451 *et seq.* The detention of the petitioner in a concentration camp by the military commander and the W.R.A., an executive agency, without trial and without a charge of crime being brought against her, also does violence to the 4th, 5th, 6th and 8th Amendments. *Ex parte Milligan*, supra. Her detention and the mistreatment incident thereto under the regulations of the W.R.A. violates the same provisions and also the 13th Amendment.

THE WRIT HAS NOT BEEN SUSPENDED.

In *Zimmerman v. Walker*, 132 Fed. (2d) 442, the Circuit Court of Appeals for the Ninth Circuit sitting in department, Haney, C. J., dissenting, declared the writ of habeas corpus was suspendable in Hawaii where martial law had been proclaimed by the Governor and the writ suspended by him under ostensible authority lodged in him by Sec. 67 of the Organic Act of the Territory, 48 USCA, Sec. 532. A hearing on the application for the writ had been granted by District Judge Delbert E. Metzger to Hans Zimmerman, a civilian citizen, who sought release from detention by the military authorities. (The petition had been filed by Clara Zimmerman on behalf of her husband.) No return was made to the writ. The prisoner was not produced. No evidence was taken at the hearing. Under duress by reason of General Orders

No. 57[11] issued by the Commanding General of the Hawaiian Department who had assumed the spurious title of Military Governor of the Territory the Judge denied the application. The petitioner appealed; the Circuit Court sustained the suspension of the writ and upheld the military action detaining Zimmerman by a resort to judicial knowledge of doubtful facts. The petitioner applied to this Court for certiorari to test the validity of martial rule and the suspension of the writ in an area which had been in a combat zone on December 7, 1941, but where the civil authorities on that date and continuously thereafter had been able to function normally except for military interference. While his petition for certiorari was pending the military authorities transported Zimmerman from Oahu to the Pacific Coast where, without explanation, they released him from custody. Their purpose in releasing him was obvious. Fearing a decision by this Court on the merits of the cause adverse to their desires they released him to render moot the questions presented by his appeal. The detention having been terminated abruptly the Solicitor General hastily filed a memorandum with this Court urging the cause had become moot by reason of the release and this Court denied the petition. See memorandum opinion, 87 L.Ed. 928, denying certiorari. Zimmerman felt the oppressive hand of arbitrary government and was tricked out of his judicial remedy.

[11]This order forbade the issuance of writs of habeas corpus. See text of order in 30 Calif. Law Review 396. It was not published in the Federal Register but in the Honolulu newspapers by order of the Military Governor, as were other military orders, without cost to the government.

Much publicity has been given to recent cases arising in Honolulu involving naturalized citizens of German extraction engaged in civil walks of life who had been taken into custody by the military authorities. See *Ex parte Glockner*, U.S.D.C. Hawaii, No. 295, and *Ex parte Seifert*, No. 296. On August 16, 1943, courageous Judge Metzger concluded that the Governor's Proclamation of February 8, 1943,[12] restored civil authority to the Territory and issued writs of habeas corpus commanding Lt. General Robert C. Richardson to produce the two applicants. The General ignored the commands and countered with a military fiat (General Orders No. 31) prohibiting all the Courts in the Territory from issuing writs of habeas corpus and the Judge from proceeding in the two cases in question. A violation of this fiat carried a penalty of $5000 fine and 5 years imprisonment if convicted in a provost court and any penalty, including the death penalty, if convicted by a military commission. The Judge fined the General $5000 for contempt of Court. The Attorney General's office injected itself into the controversy, prevailed upon the General to rescind General Orders No. 31 and to release the two citizens from custody and succeeded in persuading the Judge to reduce the fine to $100.[13]. Thereafter, the President pardoned the General. This was

[12]See text of proclamation in 31 Calif. Law Review 508 in appendix to article by Garner Anthony on "Martial Law in Hawaii".

[13]Glockner and Seifert were removed to the mainland United States and released from illegal detention by the military authorities. This prevented a final determination of the important issues by our Appellate Courts. The military authorities and, apparently, the Attorney General, appear to have been determined to delay a final judicial determination of citizens' rights.

a tacit recognition by the President that the General had blundered.

On March 14, 1944, Lloyd C. Duncan, a civilian detained by the military authorities under a sentence of a provost court set up at Pearl Harbor, applied for a writ of habeas corpus. The writ issued, a return was made and a hearing was had on the merits. The respondents urged the detention was justified by virtue of a state of martial rule prevailing over the Territory. The argument that a continuous state of martial law had been lawfully invoked and the writ lawfully suspended by a declaration of the territorial governor pursuant to authority delegated to him by statute made little impression. The writ was granted; the respondent appealed. See *Kahanamoku v. Duncan*, No. 10,763, and *Steer v. White*, No. 10,774, a companion case, pending in the Ninth Circuit Court of Appeals. The Judge's decision sustains our faith in government by law and restores our confidence in our Courts and in the great principles for which this Republic stands. In Hawaii, at least, the Constitution is regarded as the supreme law of the land by the civilians and the civil authorities if not by the military authorities.

Congress alone has the power to proclaim and institute martial law and to suspend the writ. *Ex parte Milligan*, supra; *Despan v. Olney*, 7 Fed.Cas. No. 3822. In the absence of a declaration of martial law the arrest and detention of a citizen by military authorities is unlawful. *U. S. ex rel. Palmer v. Adams*, 26 Fed. (2d) 141. Congress has not authorized the suspension of the writ of habeas corpus on the Pa-

cific Coast. It has not delegated or attempted to delegate the power of suspension to any executive officer. Martial law has not been proclaimed by Congress and martial rule has not been applied in this area by the Executive either with or without the approval of Congress. This area has not been in a *theater of war* as defined in the *Milligan* case. It has not been occupied by our own troops under a belief that our shores were invaded or that a rebellion had broken out in this region or that either invasion or rebellion was imminent or impending. It is not under the heel of an invader. Our civil authorities have continued to function normally. There has been no civil disorder in the country. There has not been a breakdown in the enforcement machinery of municipal law. Our Courts steadily have been open and engaged in the full performance of their normal duties. A military government has not been provided for the population of the Pacific States. It may be established in conquered or invaded territory. *Hamilton v. Dillin*, 21 Wall. (U.S.) 78, 22 L.Ed. 528; 67 *Corpus Juris*, 421, Sec. 1713 and 422, Sec. 175(2). It cannot be established in domestic territory unless it is in a state of rebellion or civil war. *Heffernan v. Porter*, 6 Coldw. (Tenn.) 391, 98 Am.Dec. 459; *Ex parte Milligan*, supra; 67 *Corpus Juris*, 422, Sec. 176(3). Without interruption from the December 7, 1941, attack upon Pearl Harbor to date the civil authorities in the Western States have been and now are functioning normally. Consequently, the decisions in the Hawaiian cases which involved questions of martial law have no application to the issues involved herein.

THE IMPRISONMENT PROGRAM WAS INSPIRED BY DeWITT'S PREJUDICE.

The secrecy of his reasons indicates his prejudice.

The detention of which the appellant complains does not arise under a claim of martial law or military government. The theory that has been suggested for the mischief done her is that it was an expression of war-power. It is odd, however, to learn that this expression of the war-making, war-waging or federal police power was directed against citizens and based upon the ambiguous excuse of a military necessity. The grounds for the existence of this nebulous necessity strangely enough long were left to the field of surmise by the military commander responsible for this military misrule. It is significant that this false necessity vanished and all talk of it ceased when General DeWitt was relieved of the Western Defense Command.

In *Hirabayashi v. U. S.*, 320 U.S. 81, this Court resorted to speculation to supply possible reasons to sustain the validity of a curfew regulation imposed upon citizens of Japanese stock by General DeWitt. It was impelled to do this because the General failed to reveal the motives that inspired his action. With seeming reluctance it invoked judicial knowledge of facts necessary to support a basis for the claim of military necessity justifying a curfew applied on a discriminatory basis. The facts were rendered palatable to the judicial tongue only by casting them into that age-worn mold from which they emerge branded matters of common knowledge or of public notoriety. Each of the facts assumed as true was highly dubious

and disputable. Had the military commander publicly expressed his reasons for his action prior to the decision it is not improbable that the curfew regulation as applied to citizens would have been declared unconstitutional and void. However, the reasons for his action were not matters of judicial knowledge because if he had any aside from prejudice they were kept closeted in the recesses of his mind until long after the *Hirabayashi* opinion was rendered. His mind could not be probed through the medium of judicial knowledge to gain information as to its secrets.

His final report demonstrates his prejudice.

On January 19, 1944, General DeWitt's "*Final Report, Japanese Evacuation from the West Coast*" was publicly released. This astonishingly brazen document is nothing but a private and self-serving report by a subordinate general to his superior officer offered as an anticipatory defense to implied charges of wrongful action. It is not an official government report. It has not been ratified, approved or adopted as an official governmental report either by the War Department or by the Commander-in-Chief. It does not appear to have been presented to the Department of Justice for approval before publication. It cannot be said that the Department of Justice ever concurred in the barbarous evacuation and imprisonment program. It appears that it opposed the program prior to its institution. It cannot be said that the President approved the plan. Executive Order No. 9066 contains nothing on its face that would have led him to

believe it would be used by a military commander to discriminate against citizens on a race origin basis. The fact that he did not interfere with the evacuation and detention is understandable. It has been characteristic of him not to interfere with the actions of military commanders but to permit them a free hand. His non-intervention is not to be construed as indicating his approval. It is not his duty to determine whether the military commanders have overstepped the allowable limits of military discretion where civilian rights have been infringed. This is a matter for our Courts to determine. *Sterling v. Constantin*, 287 U.S. 378.

From the title of the report one gathers the impression that it relates to aliens only inasmuch as it contains the appellation "Japanese" and that it covers an evacuation from the West Coast only. Inasmuch as the evacuation uprooted and excluded citizens from approximately one-fourth of the geographical area of the continental United States, the General's view of what the West Coast comprises appears to be not a little distorted.

On page 7 thereof he reveals his vicious program was carried into execution simply because he suspected the geographical distribution of persons of Japanese pedigree on the Pacific Coast "appeared to manifest something more than coincidence." He concluded that these people were "ideally situated with reference to points of strategic importance, to carry into excution a tremendous program of sabotage on a mass scale should any considerable number of

them have been inclined to do so." It is significant that this report was compiled and published long after the evacuation program had been an accomplished fact. From the absurd reasons revealed therein it is quite evident that he hunted, sifted and worried in an effort to find grounds to justify his action and that he finally was impelled to resort to hypothesis supported by imponderable facts to support it. What he now offers therein as props for his astounding action is demonstrated to be nothing but a vague suspicion he entertained of these citizens by reason of their ancestry and geographical distribution coupled with an apparent prejudice he harbored against them. Whether he was misled by propaganda into believing these people were dangerous or whether he viewed them as a menace simply by virtue of his inherent prejudice against them makes little difference. Neither reason created an actual military necessity or condition justifying their banishment or any type of discrimination against them. Not one authentic case of espionage or sabotage can be attributed to any of these citizens or aliens either prior to or since Pearl Harbor. It must be assumed that he was familiar with the fact that none of these people in Hawaii had been guilty of any disloyal or hostile acts. The Tolan Committee hearings had been attended by his observers in San Francisco and Los Angeles and its published report revealed that all the reliable data from Hawaii proved they were as trustworthy as any of our inhabitants. (H.R. 2124, pp. 49 to 59.) He knew or ought to have known from his own observa-

tion and reputable authorities on the Pacific Coast that the citizens of Japanese ancestry here were as loyal and devoted to this country as any citizens and that the aliens were as friendly to us as "white" aliens if not more so. Ignorance on his part of these facts is inexcusable.

His public utterances prove his prejudice.

That it was prejudice and not a *bona fide* military necessity that inspired his extreme orders which resulted in the detention of the appellant and 73,000 citizens appears from testimony he gave before a House Naval Affairs Sub-committee in San Francisco which was circulated widely by press and radio. The San Francisco News of April 13, 1943, quotes a part of his testimony as follows:

> "Charges of a movement to bring American-born Japanese back to the Pacific Coast were made today by Lieut. Gen. DeWitt, commanding general of the Western Defense Command and Fourth Army, at a House naval affairs subcommittee hearing here. He said he would oppose this movement 'with every effort and means at my disposal.'
>
> 'I don't want any Jap back on the Coast,' said General DeWitt, after informing the committee of 'a feeling developing in certain sections and among certain elements' to bring these American-Japanese back to the Coast military area.
>
> 'There is no way to determine their loyalty,' he declared. 'This West Coast is too vulnerable. I am opposing this movement with every effort and means at my disposal.

I have two problems—defending this Coast against espionage and sabotage by the Japs and driving them off the face of the map in the Aleutians.

It makes no difference whether the Japanese is theoretically a citizen—he is still a Japanese. Giving him a piece of paper won't change him.

I don't care what they do with the Japs as long as they don't send them back here. A Jap is a Jap.'"

His charge that these American citizens are *Japs* is false. A Jap, a contraction of the word Japanese, is a person of Japanese nationality. These citizens are of American nationality and no General, as an administrative official, has the right to brand them nationals of an enemy nation. The three stars on the shoulder straps of a lieutenant-general which these citizens through the Congress have conferred upon him do not entitle him in his official capacity to brand loyal citizens traitors to this nation. They do not establish in the wearer an infallibility in judgment as to what is and what is not a military necessity. They do not guarantee the wearer to be free from prejudice. They do not remove his acts and utterances from the field of public opinion, criticism and censure. They do not operate as a guaranty that the wearer is always a person of sound judgment and mature discretion.

His testimony betrays a wanton willingness to ignore the constitutional rights and liberties of these citizens. It also exhibits a peculiar and remarkable

knowledge as to the methods by which citizenship is obtained. Alien Japanese are ineligible to citizenship. *U. S. v. Ozawa,* 260 U.S. 178. The native-born become citizens by virtue of the fact of their birth in this country under the *jus soli* as expressed in the 14th Amendment. *U. S. v. Wong Kim Ark,* 169 U.S. 649; *Morrison v. California,* 291 U.S. 82; and *Regan v. King,* 134 Fed. (2) 413, cert. den. 87 L.Ed. 996. Neither the alien ineligible to citizenship nor the native-born receives a certificate of citizenship, the "*piece of paper*" so disparagingly referred to by the General. His remark that a "*Jap is a Jap*" as applied by him to American citizens of Japanese ancestry reveals that he regards the provisions of the 14th Amendment very lightly. The Amendment confers American nationality and citizenship upon the native-born regardless of the nationality of their forebears. Citizenship is not limited to the pink-complexioned and is not a thing of degree. If an American-born citizen of Japanese ancestry is a Jap and not an American, as the General asserts, the General himself cannot be an American either but necessarily must be of the foreign nationality that attached to his own ancestors.

In view of his testimony and the contents of his "*Final Report*" it no longer can be argued that the evacuation and imprisonment program he instigated was based upon a military necessity or that it was the result of sound discretion and mature judgment. Neither can it be said that his action taken against the appellant was conceived in good faith and was an

emergency war measure directly related to the prevention of a crime in which the appellant was a participant. Neither his orders nor those of the appellees herein satisfy the tests necessary to validate military or administrative action abridging a citizen's fundamental constitutional rights which were laid down in *Sterling v. Constantin*, supra. It follows that the detention of the appellant by the appellees is illegal and that it was error for the District Court to have refused to issue the writ unless there is merit in its conclusion that the petitioner failed to exhaust her administrative remedies as a prerequisite to the right to receive the writ.

CONSTITUTIONAL RIGHTS INVADED.

In issuing his proclamations and orders arresting and banishing the appellant and these evacuees the General usurped legislative power in violation of Art. I of the Constitution. In presuming to sit in judgment on these people after seizing them and in condemning them to exile and detention without accusations of crime being brought against them and without affording them trials the General and the W.R.A. have usurped judicial power in violation of Art. III of the Constitution and have violated the provisions of the 4th and 6th Amendments. *Ex parte Milligan*, supra. They persist in depriving them of the fundamental "privileges and immunities" of citizens guaranteed by Art. IV, Sec. 2, cl. 1 of the Constitution and of all the inalienable rights of national and state

citizenship in violation of the due process clause of the 5th Amendment. See *Schneider v. Irvington*, 308 U.S. 147; *Holden v. Hardy*, 169 U.S. 366,389; *U. S. v. Cruikshank*, 92 U.S. 542; *Corfield v. Coryell*, 4 Wash. (U.S.) 371, 6 Fed.Cas. No. 3230; *Hague v. C. I. O.*, 307 U.S. 496. They have restricted the "freedom of movement" to which these citizens are entitled. *Williams v. Fears*, 179 U.S. 270; and concurring opinions in *Edwards v. California*, 314 U.S. 160. They have curtailed the right of these people "to live and work" and "to establish a home" where they will. *Allgeyer v. Louisiana*, 165 U.S. 578,589; *Meyer v. Nebraska*, 262 U.S. 390, 399; *Colgate v. Harvey*, 269 U.S. 404. The appellant has been deprived of her right to work, of the earnings of her labor and her status as a permanent civil service employee of the State of California in violation of the due process clause of the 5th Amendment and of the just compensation clause thereof. These are property rights. *Truax v. Raich*, 239 U.S. 33, 38. Evidently the General and the W.R.A. are unaware that these privileges of national citizenship inhere in all citizens and are safeguarded by the Constitution. Apparently they view these unfortunates as *res* and *persona* but not as citizens or humans. It seems clear they do not view banishment and detention as constituting an *infamous punishment* forbidden by the 5th Amendment (*U. S. v. Moreland*, 258 U.S. 433) or as constituting a *cruel and unusual punishment* forbidden by the 5th and 8th Amendments. (See opinions of Justice Brewer in *U. S. v. Ju Toy*, 198 U.S. 253, 269-270.) Apparently they do

not view the detention as a form of slavery forbidden by the 13th Amendment. Evidently they did not realize that what they were doing was forbidden as working a corruption of blood and forfeiture upon these people, without trial, upon a theory of the constructive treason of their remote ancestors. This is forbidden by Art. III, Sec. 3 of the Constitution. *Shortridge v. Macon,* 22 Fed.Cas. No. 12,812. They could read the Constitution with profit if not for pleasure. Had they been conscious of its principles they would not have meddled with the rights of these citizens. Ignorance of the law cannot be accepted as an excuse for their wrongful action. Their attitude was reckless which makes the wrongs worse.

Individual guilt appears to be the test for a deprivation of substantial constitutional rights. *Ex parte Quirin,* 317 U.S. 1. The appellant has not been accused of crime. The Director of the W.R.A. has found her to be loyal. If a military tribunal could not try Milligan it is difficult to understand how a military commander and the Director of the W.R.A. could seize the appellant without charges being lodged against her, dispense with a trial or try her in the recesses of their own minds or upon secret evidence and condemn her to imprisonment. Such mistreatment is not only violative of the 4th, 5th, 6th, 8th and 13th Amendments but is an assumption by each of them of judicial power lodged exclusively in the Courts by Art. III of the Constitution. It is also a usurpation by them of legislative power lodged exclusively in Congress by Art. I of the Constitution.

It is also directly violative of the natural rights and liberties reserved to the appellant by the 9th and 10th Amendments.

The validity of the detention of the appellant is to be determined by conditions existing at the time her application for a writ of habeas corpus finally is decided by this Court. *Stallings v. Splain*, 253 U.S. 339, 343; *Mensevich v. Tod*, 264 U.S. 134, 136. The Court will take judicial notice of the utter absence of any military necessity justifying her detention. The Battle of the Coral Sea in May, 1942, and the Battle of Midway (June 2-6, 1942) removed Hawaii from any threat of invasion. The remote Aleutians have been cleared of enemy troops. Our flag flies over the Solomon, the Gilbert, and the Marshall Islands. Our forces occupy the Marianas. Japan is on the defensive in her own homeland and surrounding waters. She has lost the initiative, the capacity and the taste for offensive warfare. She is incapable of consituting a serious threat of danger to our island outposts or to the islands wrested from her grasp. It is extremely doubtful that she could launch an isolated air-attack against the mainland United States. Germany is hemmed in a ring of steel—her military might in Europe is ebbing rapidly away—she is near final defeat. In granting the appellant a leave clearance the Director of the W.R.A. admits she is a loyal citizen, and admits that she is not a menace to our security. Nevertheless, he persists in detaining her against her will and desire in a degraded concentration camp. The writ should issue.

ITHER EVACUATION NOR DETENTION WAS AUTHORIZED BY THE PRESIDENT AND CONGRESS OR BY EITHER.

ecutive Order No. 9066.

In the *Hirabayashi* case this Court held that Public aw No. 503 constituted a ratification of Executive rder No. 9066 in so far as the order might be conrued to authorize the imposition of a curfew regulaon for a limited period of time as an emergency war easure designed as protection against possible espioge and sabotage at the time of a threatened invasion. he decision contains no intimation that the presintial order was intended to authorize the General evacuate and imprison citizens or that it did or uld authorize such action. Public Law No. 503 beme effective on March 21, 1942, that is, 3 days before e evacuation was ordered by General DeWitt and days before the evacuation actually commenced on arch 30, 1942, under Civilian Exclusion Order No. 1. here is nothing in the statute delegating authority the executive or any military commander to banish d detain citizens. There is nothing in its legislative story indicating an intention on the part of Congress delegate such a power. The statute does not delete to the executive or to any military commander an thority to banish and detain citizens. Congress is rbidden to delegate its legislative power. It may legate a *limited discretionary power* to executive ficials only where it first sets up a standard, rule or olicy for the guidance of the executive officers and sts in them the making of subordinate rules in aid the enforcement of the statute and leaves to them e determination of the facts to which the policy

declared by Congress is to apply. *Schechter Poultry Corp. v. U. S.*, 295 U.S. 495. The statute does not delegate such a limited authority and sets up no standards, guides or policies for an executive or military officer to follow. The authority to banish and detain citizens without accusation of crime brought against them and without hearings observing the elements of due process of law would not seem to be within the war-power of Congress and the Executive for it would be tantamount to a suspension of the Constitution. Congress has not even attempted to ratify the banishment and imprisonment of these citizens. Neither the President nor Congress has signified approval of this program. The emergency justifying a discriminatory curfew certainly ceased no later than the time when our great victory in the Battle of Midway (June 2-6, 1942) secured Hawaii from the possibility of invasion and our shores from attack. It is not conceivable that any claim of emergency could justify the mass banishment and imprisonment of citizens simply because their ancestors once may have been subjects of a country with which we are today at war. Even though the Battle of Midway put an end to the advance of the Japanese forces and secured our shores from danger General DeWitt continued on with his evacuation program until the latter part of August, 1942, when the last of the evacuees was herded into a concentration camp.

It is a matter of common knowledge that our Pacific shores have not been invaded by the enemy. It is also a matter of common knowledge that there has not been

any real or imminent danger of espionage or sabotage to our military resources arising from the appellant or any of these detained citizens. No such charge of crime has been lodged against the appellant or any of these evacuated persons. Individual civilian exclusion orders issued by a military commander have been held to want validity on the ground that at the time of their issuance there was not present a reasonable and substantial basis for the judgment of the military commander issuing them that a threat of espionage or sabotage to our military resources was real and imminent. *Schueller v. Drum*, 51 Fed. Supp. 383; *Ebel v. Drum*, 52 Fed. Supp. 189. Executive Order No. 9066 does not appear on its face to have been intended to authorize a military commander to prescribe military areas of States-embracing extent or to grant him an unlimited control over civilians residing therein. The President has never asserted that such powers were lodged in himself or in any military commander. Doubtlessly he understood his order was to authorize the setting up of protective areas around military and defense installations, a limited objective of far different character from the extensive prohibited military areas General DeWitt set up in his Military Department. It is to be assumed ~~he~~ understood his order was to be used to exclude alien enemies from such restricted areas and, perhaps, citizens found to be dangerous to our security after first being submitted to examinations observing the elements of due process of law. His authority to exclude and detain alien enemies can be asserted by executive order or by presidential warrants pursuant to the Alien Enemy Act.

Executive Order No. 9102

On March 18, 1942, the President issued Executive Order No. 9102 (7 F.R. 2165) establishing the War Relocation Authority, an executive office. It delegated to this office the duty of formulating and effectuating a program for the removal, from military areas prescribed by military commanders under Executive Order 9066, of persons or classes of persons designated but not evacuated thereunder. It also vested in the Director of the W.R.A. authority to provide for the relocation, maintenance and *supervision* of all persons deported from the military areas. As applied the order aptly may be described as a "Ghetto-Establishing-Order". It also created the W.R.A. Work Corps and authorized the Director to "prescribe the terms and conditions of the work to be performed" by the evacuee citizens and aliens in the Corps and "the compensation to be paid". It is under this singular directive that evacuated citizens were recruited to perform menial tasks and hard labor at peon wages. The analogy between this type of labor and that of the vaunted Nazi Labor Corps is shocking to our sensibilities. What is this if it is not slavery and involuntary servitude? It would appear that our executive branch is unaware of the purposes of the 13th Amendment. Interned citizens and aliens employed in these camps are eligible to receive either $12, $16 or $19 per month. (See W.R.A. Manual, Chap. 50.5, par. .6-H et seq.) They labor 8 hours per day for this pittance.

The context of the order contains a recital that it was issued by virtue of authority vested in the Presi-

dent "by the Constitution and statutes of the United States". Consequently, it invokes the Alien Enemy Act and was clearly intended to apply to alien enemy evacuees. If, by the recital of constitutional authority, the President intended it also to apply to citizens it must be deemed he intended it to apply only to those individual citizens suspected and found to be disloyal and dangerous to our security after first being given fair hearings in which the elements of due process of law were observed. It is not to be presumed he would intentionally authorize a lawless discrimination against citizens on a wholesale scale because of their ancestral type. The order issued 3½ months after the outbreak of war. The evacuation was initiated on March 30, 1942, and was not completed until the latter part of August, 1942. Consequently, it cannot truthfully be asserted that there was insufficient time to examine each citizen suspect and prospective alien evacuee before his evacuation. There existed no legitimate reason to subject citizens to examination in the absence of specific charges being brought against them. Why should they be compelled to suffer the indignity of examination and be required to give an affirmative demonstration of their loyalty when we do not compel other citizens to submit to like examination and to give affirmative proof of their loyalty? Should we compel them to prove their loyalty just because a few ignorant agitators and jingoists accuse them of harboring dangerous thoughts? The accusers deserve to be examined. Are alien enemies and other citizens more to be trusted than Americans of Japanese descent just because they belong to so-called white

races? Must we always appease the agitators and jingoists? Are we to believe the presidential order was a concession to their demands? In so far as the order has been used to regulate the conduct of citizens on a discriminating basis it has neither Constitutional nor Congressional approval. By a fair interpretation of its language it cannot be construed to authorize either the banishment or detention of citizens. Neither Executive Order No. 9102 nor the rules and regulations of the W.R.A. referable thereto in so far as applied to citizens conform to any standards set up by Congress within the rule established in *Schechter Poultry Corp. v. U. S.*, supra. They possess validity only in so far as they pertain to alien enemies. Can it be argued that the President and Congress are or that either is authorized by the Constitution to discriminate against loyal citizens on a race origin basis, to imprison them indefinitely without trial, and, by adding insult to injury, to impose upon them a condition of slavery and involuntary servitude in the absence of crime upon their part?

THE DOCTRINE OF THE EXHAUSTION OF ADMINISTRATIVE REMEDIES HAS NO APPLICATION HEREIN.

It is under Executive Order No. 9102 that the W.R.A. adopted an amazing series of rules and regulations under which it exercises *supervision* over these prisoners. Supervision means the establishment of a provisional government over them which has constitutional sanction only in conquered or invaded enemy

territory. The administrative regulations pertaining to the various types of conditional and limited leave made available to successful applicants, after qualifying hurdles have been overcome, are published in the voluminous Federal Register. Before a confined citizen will be granted permission to leave these centers, an application to the Director for a *"leave clearance"* first must be made. No hearing is held on this application and its grant depends upon the whim and caprice of the Director who, in passing thereon, considers *secret reports* of the F.B.I. and other data concerning the applicant but of which the applicant has neither notice nor knowledge and, consequently, no opportunity to defend himself against charges. The types of leave available if a *"leave clearance"* is granted are termed *"short term"*, *"seasonal work"* and *"indefinite"* leave. Each of these is subject not only to restrictions but to revocation. See Part 5, Chap. 1, Title 32, Code of Federal Regulations, as amended January 1, 1944. (9 F.R. 154.) See also, W.R.A. Manual, Chaps. 60 and 110. The *"indefinite leave"* is made contingent upon the applicant consenting to notify the Director of any change of residence and employment. It is made dependent not only upon whether an applicant has financial means or is capable of self-support but also upon whether the community in which he intends to reside is willing to tolerate his presence. The latter prerequisite is a novel condition to impose upon a citizen not charged with crime. The exploiters of "slave labor" view with satisfaction the action of a government which supplies them with the cheap labor

of servants recruited from concentration camps. The applications for a leave clearance and those for one of the types of restrictive leave as well as revocations of leave are determined without hearings and in a manner in which all the essential elements of due process of law are lacking.

In form and substance the leave of whatever type, if granted, is nothing but a limited probation or parole under which the appellant would be in constructive custody of the W.R.A. and restricted in her activities. As such it is a form of punishment. *Korematsu v. U. S.*, 319 U.S. 433. In addition, it is to be observed that she would be prohibited from re-entering the States-embracing military areas from which she has been excluded by General DeWitt and from "the Western Defense Command". She could not return to her home and could not be restored to her employment. She would still "*remain in the constructive custody of the Military Commander in whose jurisdiction lies the relocation center in which the applicant resides at the time the permit is issued*". See W.R.A. Administrative Instruction No. 22, par. 9, dated July 20, 1942. This instruction has been superseded but the fact of jurisdiction still obtains. At most the leave which might be granted to her by the W.R.A. would amount to nothing more than increasing the dimensions of her prison. The restraint upon her liberty is not lessened appreciably by increasing the size of her jail. Her detention would be nonetheless real were she to be granted this restrictive leave. Congress has never authorized the W.R.A. to enact rules making the appellant's release dependent upon whether she has

means of support, whether a community will tolerate her presence or upon any other condition. It has never granted the W.R.A. the authority to pass her into the constructive custody of a military commander. Consequently, the whole argument advanced that she must exhaust what the appellees cleverly term her "administrative remedies" as a condition precedent to the right to apply for a writ of habeas corpus disappears into the thin air from which it was spun.

The appellant applied for a "leave clearance" on February 19, 1943. Six months later, on August 23, 1943, the Director of the W.R.A. granted her application. The unreasonable delay taken by the Director is neither explained nor explainable. Caprice seldom is. The grant of the "leave clearance", a supposed first step toward limited freedom of an applicant, has none of the attributes of finality, however. The grant of this supposed privilege in the instant case is a direct admission by the Director that the secret reports in his possession respecting the appellant demonstrate her to be a loyal citizen. *It is a finding by the Director that she is a loyal citizen.* Why then does this Director continue to detain her in unlawful custody? Is he an autocratic ruler? The appellant has not applied for one of the various types of conditional leave. Why should she? She reposes her faith and confidence in our Courts. She elects to be freed absolutely from illegal detention through the writ of habeas corpus as the one avenue of hope. Having admitted the loyalty of the appellant what cause has the Director to detain her? What reason can he offer?

Neither an increase in the size of her prison nor the relaxation of the restrictions involved in a grant of leave in anywise obviates the illegal detention. Only her release from the prison regardless of its size and the removal of the restraint imposed upon her so that she may return freely and without interference to her home and employment and pick up the normal threads of her life can nullify the illegality of the detention. Only the restoration of her absolute rights as an American citizen can wipe out the illegal detention. This means nothing short of restoring her to the status quo she occupied prior to her involuntary banishment.

The appellees evidently believe that illegal detention of a prisoner must consist either of confinement to a dungeon or a cell of a prison before habeas corpus lies. They seem to forget that it is the illegality of the commitment to which the form of restraint is incidental that the writ is directed. Peculiarly they seem to argue that a prisoner allowed the run of a courtyard, a trusty allowed to wander outside prison walls, a parolee granted a restricted leave and a probationer granted a conditional leave waive the remedy for an illegal commitment because they have elected to accept these administrative benefits from our modernized prison system. According to their argument the acceptance of these benefits upon terms the prison authorities may lay down is a condition precedent to the right to seek relief from illegal custody. This they have termed the doctrine of exhaustion of administrative remedies which they suggest must be followed

before a citizen's application for habeas corpus can be entertained.

An alien enemy, friendly to the United States, seeking the benefits of the W.R.A. leave permit might well be denied a right to seek a legal remedy in a Court of law for release from detention without first exhausting whatever administrative remedies might have been provided by the executive because jurisdiction over them in time of war is exercised under the Alien Enemy Act. It is unthinkable that a like jurisdiction can be exercised over citizens engaged in civilian occupations unless we are willing to acknowledge that our American government and civilization is a throwback to despotism and unless we are willing to admit that we have here the forerunner of what Italy and Germany experienced during the ascendancy of Mussolini and Hitler to power. The appellees, as W.R.A. authorities, paint a roseate picture of the life of these prisoners in the concentration camps. General DeWitt has done the same thing. From his *Final Report* which contains numerous posed photographs in its pictorial summary one might gain the impression that life in these camps is a satisfactory, happy and joyous one and that the inmates have never awakened to the realization they are living in cages. Neither the appellees nor the General appear to possess the inclination to portray the stark realities of life in a concentration camp. They should study the realism portrayed by Goya. Those who wreak injury never feel the pain and never understand the suffering.

In *U. S. v. Sing Tuck*, 94 U.S. 161, a case upon which the appellees have relied, Chinese seeking entry into this country under a claim of citizenship were required to exhaust statutory administrative remedies before invoking the aid of the Courts by habeas corpus. The "preliminary sifting process provided by statute" by means of which their citizenship could be established was held to be a valid prerequisite to the grant of an application for habeas corpus. The "detention during time necessary for investigation" was temporary and was reasonable in duration. The administrative remedy was prompt and adequate. Had it not been adequate the writ would have issued. Of similar import is the recent case of *Falbo v. U. S.*, 88 L. Ed. 248, where the validity of an administrative regulation sanctioned by Congress was attacked but not the constitutionality of the Selective Training and Service Act of 1940. Here, however, we are not concerned with proving the appellant is a citizen. It is admitted that she is and that she has not engaged in any criminal act. At the time of her imprisonment no administrative machinery had been set up to grant her adequate relief. None then was intended to be set up. None since has been set up. We are not seeking or attacking the prison fare, dole or limited leave benefits. We are attacking the whole illegal detention. Here we are concerned with a plot which resulted in the banishment and illegal detention of the appellant under a series of military orders issued in complete violation of the letter and spirit of the Constitution. Her detention is real: it is illegal. She has no adequate

remedy except by habeas corpus. If she tried to break away from her prison she would be shot by the armed guards who patrol outside. This would be a release from detention but not a judicial remedy for it. Apparently the appellees now argue that to gain a judicial remedy the appellant must play hide and seek with the executive officers responsible for her incarceration and detention, the officers doing the hiding and she the seeking.

Congress has never authorized the President or the W.R.A. to detain citizens under Executive Order No. 9102 or to establish a special provisional government over them consisting of administrative rules and regulations. It has no such power under the Constitution. A law creating power it cannot invoke cannot be invoked by the executive branch.

TWO AND A HALF YEARS OF GOVERNMENTAL APATHY IS TOO MUCH.

The Administration has had more than two years in which it could have had all these prisoners examined—two long years in which to give them fair and open hearings, to examine them and to segregate the disloyal ones, if any they found, from the loyal ones. How has it spent its time and to what purpose? What terrible policy has it followed that it has failed to release every loyal citizen by this time? It has blundered. It is muddled. The W.R.A. has been hampered by investigations conducted for political purposes and by administrative red tape. It is confused by its own

experiments. Its delay in ascertaining the loyalty of these citizens and giving them prompt release has caused dissatisfaction to arise—a small number of embittered prisoners to abandon all hope of ever being released and a smaller number to reach the conclusion that expatriation when peace comes is the only solution for their future welfare even though it means they will be classed as disloyal and be placed in a special prison, the Tule Lake Segregation Center.[14] Under Administration prompting but with Administration fetters hampering it the W.R.A. went afishing for sharks but its record shows it caught nothing but minnows. Time is life and our public authorities seem to be wasting it away. Yes, the W.R.A. had two long years to achieve the purpose for which it was ordained but its work is still to be done.

[14]The condition precedent for a compulsory admission to the Tule Lake Segregation Center is a denial of leave clearance while detained in a relocation center. A transfer to this segregation center is tantamount to an implied classification that the transferee might be a disloyal person. A denial of leave clearance depends upon the whim and caprice of the Director of the W.R.A. It can be based upon rumor, hearsay and suspicion or upon no reason whatsoever. It can be based upon arbitrary factors which shock the conscience of sober-minded persons. The applicant, unaware of the nature of any accusation against him and in ignorance of the contents of the dossier maintained by the Director and without a hearing of any kind or chance to defend himself against rumor and unjust charges, is ordered transferred to this Tule Lake Segregation Center. See W.R.A. Manual, Chaps. 11C and 60.10. By regulation established October 15, 1943, a person detained in this center may reapply for leave clearance. See W.R.A. Handbook, Secs. 60.11.1 to 60.11.11 inc. A person is impliedly characterized as disloyal if he signifies an intention to be expatriated at the close of the war because of his prolonged detention and resultant impoverishment. What is to be expected of citizens who are jailed for nothing, who are denied a hearing and are kept in prison indefinitely? Isn't this punishment for harboring what the Director may imagine to be "dangerous thoughts"?

A strange contrast.

Contrast the W.R.A. record with that of an efficient department of government which experiences but little interference from the Administration. The Federal Bureau of Investigation took into custody thousands of alien enemies, Japanese, German and Italian, immediately following the outbreak of war. These aliens were given prompt individual hearings on the question of their loyalty to this country by the Department of Justice. The few found to be hostile to us were transferred to special internment camps policed by the Immigration authorities. Those found to be loyal or at least friendly to us and not dangerous to our security were liberated within a few weeks following their arrest.[15] If the thousands of alien enemies suspected of being disloyal to us were examined in a short space of time at open hearings with a chance to defend themselves against charges of hostility and the great majority of them were found to be friendly to us and were released promptly, why is it that citizens whose loyalty either has been proven or ought to have been determined by this time are still denied fair and open hearings by competent tribunals and are yet detained in these concentration camps? Why is it that the military exclusion orders have not been cancelled? Is our Administration so confused it doesn't know what to do? The prolonged detention and impoverishment of loyal citizens is not a method by which patriotism and loyalty is sustained but one calculated

[15] See the survey of the activities of the Attorney General issued during the week of December 1, 1942.

to dissipate patriotism and to breed disloyalty. These confined loyal citizens are not a menace to this nation. The serious menace to this nation and the great principles it represents arises from those professed loyal persons who condemn innocent persons to imprisonment not for cause but because of their type of ancestry. These pseudo-patriots, while shouting their own loyalty demonstrate by their acts and utterances a want of loyalty to the basic principles upon which this Republic was founded. If any persons deserve to be cooped up or quarantined as being dangerous to the principles of the Constitution it is these fascist-minded pseudo-patriots whose spiritual home is in a Nazi infested Europe.

Community hostility does not justify detention.

The appellees have declared that a considerable number of persons in the States in which evacuees were to be imprisoned held an attitude of hostility and suspicion toward them and that, consequently, this mass deportation and imprisonment was a species of *protective custody* designed for their benefit. Was it not Adolph Hitler who first made these words infamous? Have we not followed a pattern he first laid down for the treatment of non-Aryans? Should we take pride in it? The barbed-wire that surrounds these camps and the armed guards that patrol outside are not there for the purpose of preventing visitors from gaining admission but to prevent the prisoners from leaving. The appellees have intimated that perhaps it was a species of *preventive custody*, that is, a method designed to protect the evacuees from them-

selves or from inflicting harm upon others. These words also were made infamous by Hitler. Even a threatened lawless conduct upon the part of criminally inclined persons would not justify the segregation of their intended victims or the denial of their constitutional rights. See *Buchanan v. Warley*, 245 U.S. 69, 81, and *Hague v. C.I.O.*, 307 U.S. 496. However, if the government is seriously concerned about the protection of persons against the threats of criminals and confesses that it does not know how to cope with the problem it can be solved simply by converting these concentration camps into protectional camps for the benefit of those who feel they need such protection. Admission, however, would have to be invitational and departures at will.

The probability of community hostility to unsupervised relocation suggested by the appellees as a possible reason for this "protective custody" is sheer hypothesis based upon vague statements of various state officials who long were opposed to migratory workers entering their States for permanent residence. They welcomed them when the demand for labor to handle their seasonal crops exceeded their own labor supply. These states today are confronted with serious shortages in manpower in their agricultural and industrial fields and the press of reality would induce them to welcome workers regardless of race, color or creed. If community hostility would endanger these citizens it is obvious that the mobsters who would do them violence are the ones who ought to be reposing in prison. It certainly is a travesty on

our civilization to think that the lawless are at large while the law abiding are incarcerated. Are we to suppose there is merit in the argument that racial and religious minorities must be imprisoned because a governmental agency believes there is an undercurrent of hostility against them in a few communities? Since when has America recognized that the rank and file of her citizens are lawless and uncivilized? If mobsters found in society were to break out into the open a few shots by the police would be enough to disperse them. The lawless are usually those who possess the least courage when confronted with the violence they would inflict upon others. Napoleon used a whiff of grape-shot on a Paris mob and a revolution was ended. Since when has this Republic stood for the imprisonment of the innocent and harmless and the needless protection of the lawless? The appellees, in arguing that hostility might develop toward these people, seem to be unaware of the moral fiber and intelligence of the American people. They cannot cite a single example of physical harm inflicted upon any of these citizens or aliens by any lawless person or group during the interval between December 7, 1941, and the time of their evacuation or since then. The American public is not of a brutal breed. The appellees appear to be alone in their lack of confidence in the ability of our civil authorities to maintain law and order. Have their own sensibilities been so blunted they do not comprehend they have trifled with sacred rights and wronged a people without cause?

CONCLUSION.

The Constitution was born in a period of great spiritual upheaval. It was not intended to permit autocratic ruling within the framework of democratic processes. In the hands of its creators it was one thing—a thing of great beauty, designed to endure for ages. In the hands of its administrators and, all too frequently, in the hands of its interpreters it has become quite another thing, a warped and misshapen thing. It is as though it were an emblem set up as a fetish by the government which the people have been led to worship instead of the great principles it represents. Its guaranties are atrophying during a period of spiritual decline. Little minds which never understood its great purposes have hacked it away. Never having felt its inspiration they seem not to regret its loss. We must not lose sight of the historical fact that when the people are sheared of their liberties they never succeed in regaining the lost fleece. Yet is there time, a little time, in which the Constitution may be rescued. Upon our Courts the final effort to save it rests. If they fail us now, dictatorship will ride over the land and the bare symbol of liberty from which the spirit has departed will be left to beguile a gullible public.

Our total energy is harnessed to the war machine; the whole country is an immense arsenal. Each locality in our States is engaged in the production of war material or contributing in some measure to the national effort. Each contains national defense *material, premises* and *utilities* as defined in 50 USCA, Secs.

101, 104. It was for the protection of these against espionage and sabotage that Executive Order No. 9066, the military orders and the W.R.A. rules and regulations are asserted to have been devised. An examination of these statutes discloses that practically everything we produce in America, buildings, utilities, installations and equipment, highways of commerce, and all products of factory and field are included within the classification of national defense material, premises and utilities. It is obvious, therefore, that the Secretary of War, or a military commander however obscure, however incompetent, and however prejudiced may claim the right and power, under Executive Order No. 9066, to exclude any and all persons or classes of citizens from any part or the whole of the United States and to imprison them indefinitely. It is argued that this is due process of law under the 5th Amendment when the fact is that it is the negation of constitutional government. Whence does the executive branch derive the right to suspend the Constitution? It has no mandate from the People. Its action herein was a transparent device to seize power and to substitute its will for the will of the People. What it did here was not done with the consent of Congress and could not have been done with its consent. It transcended constitutional boundaries. What it did was an expression of autocratic power. What it has done to these 73,000 citizens it has done to all citizens. Are we a servile people upon whom our administrative servants may tread with impunity?

The areas from which the appellant and these peo-

If curfew regulations and travel restrictions had been imposed upon the excluded persons for a reasonable period of time while a genuine and prompt attempt was made by the authorities to ascertain if there were any spies or saboteurs in their midst it might have been argued that although the practice was abominable the motive at least was laudable. However, inasmuch as the forbidden areas take in approximately one-fourth of the geographical area of the continental United States and in excess of two and one-half years has elapsed since the removal of these people, it must be concluded that the whole banishment and imprisonment program was instigated by the military commander and is continued by the appellees in an unreasonable, arbitrary and oppressive manner. It was and is wholly capricious. It was and is unnecessary. It was not and is not the product of sound judgment and discretion. If this terrible evacuation program is lawful constitutional government has lost its vitality and we are under the heels of a dictatorship.

If ever there was an excuse that might have been offered for a temporary detention of the appellant and these 73,000 citizens or of any friendly alien enemy it long ago ceased to have a basis in truth. Our shores are neither harried nor harassed by the enemy. Our victory in the Battle of Midway marked the ebb of Japanese aggression. Our military and naval authorities have rescinded the dim-out orders and have repeatedly announced that our Western shores are beyond the range of enemy action and are not expected to be attacked. We long have been on the

offensive and our enemies, European and Asiatic, on the defensive. Thousands of young Americans of Japanese ancestry have been serving in our armed forces with courage, loyalty and devotion. Their dead, our dead, have littered the isles of the South, Central and Western Pacific and the shores of Sicily and Italy. Thousands were serving before Pearl Harbor and additional thousands since have joined their ranks, laying down their lives on the altar of freedom. This altar has been stained by the fact that irresponsible persons at home have deprived the families of these youths of the very freedom for which these youths sacrifice their lives. By their deeds these young soldiers have demonstrated their loyalty and compel the conclusion that neither they nor their families should have been compelled to suffer the indignities of banishment and imprisonment and the terrible suffering these innocents have undergone and still undergo. Each of the questions certified to this Court should be answered in the negative. If the judgment of the Court below is not reversed and the writ ordered to issue we shall know that Justice has been dethroned and that Tyranny sits triumphant viewing the ruins of what once we had termed the Constitution and our Bill of Rights.

Dated, San Francisco, California,
September 14, 1944.

Respectfully submitted,
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